CENTRE DE DROIT
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Fraudulent orders

The joint account that damages relationships

Par Fabien Liégeois le 2 September 2025

'*If money doesn't bring happiness, give it back* !' said Jules Renard. Coluche seized on the phrase with his characteristic wit, and the line struck a chord with people throughout France and Navarre. The following story, sadly familiar, brings us back to this strange paradox. The ruling it generated, TF 4A_577/2024 of 10 July 2025, confirms a carefully reasoned decision by the Zurich Handelsgericht (133 pages) concerning a lack of legitimacy. We apologise in advance to the reader for the length of this commentary.

Carlos, the elderly father (born in 1929), is Spanish and Venezuelan. In 2008, he opened a joint account (Oder-Kontobeziehung) with his daughter Beatrice at the Zurich branch of Bank AG and opted for the so-called 'remaining bank' clause. In the event of a lack of legitimacy, the general terms and conditions of Bank AG, which are part of the relationship, transfer the risk to the clients and provide for a claim clause. Carlos manages the funds he has contributed to the account himself. In 2014, the father moved to Madrid with a woman, Eléonore, who is not the mother of his daughter. Diane, the relationship manager at Bank AG, maintains close contact with Carlos and his new partner. At the end of 2014, the account balance stands at USD 10 million. Between 2015 and 2016, Eléonore, her daughter and her granddaughter receive numerous transfers from the joint account (totalling approximately USD 6.7 million). In autumn 2016, the account was closed and the balance transferred to another account at the same bank in Carlos's name (alone). In 2018, Béatrice inquired about the situation ; Diane invited her to visit. Once in Zurich, Béatrice learned that there was nothing left. She immediately initiated adult protection proceedings in Madrid, which resulted in her father, who was suffering from Alzheimer's disease, being placed under guardianship. At the same time, she took criminal action against Eléonore, her descendants and her father's Spanish lawyer. The complaint was dismissed : Carlos's capacity of discernment at the relevant time could not be established with certainty. Carlos died in 2023.

Béatrice took action for payment through a partial action within the meaning of Art. 86 CPC (USD 700,000 and EUR 300,000) and reserved the right to take further action for the full amount (USD 5 million and EUR 2.5 million). Although she was unsuccessful in relation to most of the transfers, a transfer of USD 3.5 million, executed on 7 September 2016, was an exception. The Zurich judges held that Bank AG had acted without authorisation in this case and committed a serious breach of duty because it had the order confirmed by Eléonore (who benefited from it) and not by Carlos (who had instructed it). Béatrice, who did not contest the order in time, had her claim reduced by one third. As Béatrice's partial action relates to USD 500,000 for this transfer, Bank AG is ordered to reimburse her USD 333,333. The starting point

for the 5 % default interest is set at the day after the bank received Béatrice's letter of formal notice.

Bank AG appeals to the Federal Court. The dispute is limited to the transfer of 7 September 2016. The three-step method applies : was the disputed transfer executed with or without a 'mandate' (step 1) ? If the order was executed without a 'mandate', is the risk transfer clause valid (step 2) ? If not, can the bank offset its debt (Beatrice's claim for restitution) against a claim for damages against the client (step 3) ?

Step 1 : Bank AG argues that the Zurich Handelsgericht wrongly denied the probative value of a series of clues that would confirm that the disputed transfer originated from the father. Among these, it cites a donation contract apparently signed by Carlos and a notarised statement from 2019 in which the 90-year-old man claims to remember 'perfectly' having confirmed the instruction on the same day by telephone. According to the Federal Court, these indications are not sufficient to confirm that Carlos was the author of the instruction. With regard to the probative value of a private expert opinion, it specifies that Art. 177 CPC, in force since 1 January 2025, does not apply to the present dispute. It can therefore consider this expert opinion as a mere allegation and not as a title (*Urkundenqualität*). Finally, it notes that Carlos does not confirm that he signed the disputed instruction in his 2019 statement ; he merely refers to a telephone conversation. The Zurich judges therefore did not act arbitrarily in concluding that the authenticity of the signature had not been established.

Step 2 : Did Bank AG commit gross negligence (*grobfahrlässig*) by failing to have the order confirmed by the father ? In principle, the bank is not required to take extraordinary measures that are incompatible with the rapid settlement of transactions or to systematically assume the existence of forgery. It must only carry out additional checks if there are serious indications of forgery, if the order does not relate to a transaction provided for in the contract or usually requested, or if special circumstances give rise to doubt. *In casu*, various anomalies imposed a duty of increased vigilance (*von einer erhöhten Prüfobliegenheit*). Among these, (i) Carlos's signature on the instruction differs significantly, to the naked eye, from that on the account opening form ; (ii) the instruction was typed, meaning that it could have been written by someone else ; (iii) the high amount, which, when combined with a transfer made in May 2016, amounted to almost half of the account balance. In view of these factors, Bank AG committed a serious breach of duty ; its risk transfer clause is therefore invalid. In the alternative, Bank AG argues that the transfer should have been considered approved. In addition to the prior instruction, the transaction may be deemed to have been ratified (nachträgliche Genehmigung) by the client who fails to contest it within the time limit set out in the general terms and conditions. The fiction of ratification also applies in the case of a bank retention clause, provided that the challenge is objectively possible and reasonable. When the bank retains the documents, it must be asked whether consulting them would have enabled the customer to detect the forgeries. *In casu*, according to the bank, a telephone conversation in 2015 would prove that Carlos requested monthly account statements to be sent to him. While specifying that '*the objection of gross negligence*' (*der Einwand der Grobfahrlässigkeit*) would fall if the correspondence had actually been delivered to the account holder, the Federal Court held that this was not the case. It was not sent to Carlos systematically but on request. The argument of ratification of the disputed transfer is therefore rejected.

Step 3 : The bank that pays incorrectly pays twice, unless it can claim damages from the customer on the basis of Art. 97 CO. *In casu*, the Zurich Handelsgericht held that Béatrice had

breached the contract by failing to check her correspondence until 2018 and that the damage suffered by the bank was causally linked to this breach. Comparing the respective faults, it considered that the (concurrent) fault of Bank AG was clearly predominant (hence the reduction of Béatrice's claim to one third). Bank AG argues that Béatrice's fault is not 'minor'. After pointing out that Art. 44 para. 1 CO (*cum* Art. 99 para. 3 CO) confers broad discretion on the judge, the Federal Court upheld the decision of the lower court. It states that Bank AG is mistaken in criticising Béatrice for never having consulted the documents in ten years : only the relevant period is important for assessing her fault, i.e. January 2015 to September 2016. Bank AG's appeal is therefore dismissed.

We would like to make four modest comments :

1. In this case, the bank was not in a conflict of interest, which distinguishes this case from ATF 146 II 121 (trusted person, see Liégeois, cdbf.ch/1135/). In our opinion, the conflict of loyalty inherent in joint accounts remains (for an example, see Brander, cdbf.ch/1231/). It is regrettable that Diane did not take the trouble to invite Beatrice to Zurich earlier. At a time when the number and size of the transfers were increasing, Carlos' deteriorating health would undoubtedly have justified such a move.
2. The 'remaining bank' clause accentuates the risks associated with joint accounts. While the former is losing its practical importance, the latter continues to be used within families. While it may be difficult to come and consult documents on site regularly when you live, like Beatrice, in Venezuela, it seems to us that a client who fails to consult documents made available via e-banking would be committing a more than minor offence.
3. For customers, or their representatives, who do not consult the documentation they receive, the penalty may be as severe as the loss of their right to restitution due to the breaking of the causal link (see TF 4A_610/2023 of 8 January 2025 [foundation], commented on *in* Hirsch, cdbf.ch/1398/).
4. More fundamentally, there remains some ambiguity about the application of a third stage when the parties have agreed on a risk transfer clause, regardless of whether or not the clause is effective. The Federal Court recently noted that : '*when the parties have agreed on a risk transfer clause, there is no third step as is the case when the legal system applies*' (TF 4A_610/2023 [foundation], c. 3.3). It added in the same consideration : '[i]t is in the context of examining the bank's serious fault, which is reserved (Art. 100 para. 1 CO by analogy), that the judge must then examine the client's contributory fault as a factor interrupting the causal link or reducing the compensation due to him'. Some legal scholars criticise this consideration on the grounds that an action for performance leaves no room for an examination of the client's fault (Hirsch/Pittet, L'illusion d'une causalité interrompue, RDS 2025, p. 189 ff.). We do not agree with this point of view. First, the reasoning based on Articles 100 and 101 CO is by analogy, which leaves room for manoeuvre. Second, the risk transfer clause reintroduces, whether we like it or not, the issue of fault. Finally, we continue to believe that this three-step method provides a useful framework, but one that should not obscure the essential point : in a civil case where the blame is shared, the judge must render a materially fair (sachgerecht) decision. The outcome depends on the circumstances of the case and not on extrinsic factors. While it is important to weigh up the faults, the reasoning stage (2nd or 3rd stage) appears to be of secondary importance to litigants. A clarification of case law (whether or not there is a third stage in the presence of an *ineffective* risk transfer clause) could, on the other hand, prove useful to

litigants who, when in doubt, engage in cascade reasoning. Coluche, for his part, used them to absurd effect.
